STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
v	No. 292958 Wayne Circuit Court
LEQUIN DEANDRE ANDERSON, Defendant-Appellant.	LC No. 09-003797-FC

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for voluntary manslaughter, MCL 750.321, and felonious assault, MCL 750.82. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 12 ½ to 25 years for the voluntary manslaughter conviction, and one and one half to four years for the felonious assault conviction. We affirm.

Defendant first argues on appeal that the trial court erred in denying his motion for a directed verdict because the prosecution failed to prove the elements of second-degree murder beyond a reasonable doubt, and failed to disprove the elements of self-defense beyond a reasonable doubt. We disagree. This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

As noted by defendant, in *People v Graves*, 458 Mich 476, 486-488; 581 NW2d 229 (1998), the Michigan Supreme Court held that where a defendant is improperly charged with a higher offense, but the jury convicts him of a properly submitted lesser included offense, reversal is warranted only where there is persuasive evidence of jury compromise. However, circumstantial evidence and reasonable inferences drawn from evidence may be sufficient to prove the elements of the crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Regardless of how inconsistent or vague the testimony of a witness was, the trial court may not determine the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Rather, questions regarding the credibility of witnesses are to be left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991).

"The offense of second-degree murder consists of the following elements: '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464. The malice required for second-degree murder can be inferred from evidence that the defendant "intentionally set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998). Second-degree murder "does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

To be entitled to the defense of self-defense, an individual must have acted out of an honest and reasonable belief that the use of deadly force was necessary to prevent his imminent death or imminent great bodily harm. *People v Riddle*, 467 Mich 116, 142 n 30; 649 NW2d 30 (2002). A defendant acts in self-defense when he "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). The use of deadly force in self-defense is justified if 1) the defendant honestly and reasonably believed that he was in danger, 2) the danger which the defendant feared was serious bodily harm or death, and 3) the action taken by the defendant appeared at the time to be immediately necessary, i.e., the defendant is only entitled to use the amount of force necessary to defend himself. MCL 780.972; MCL 780.961; *Heflin*, 434 Mich at 502. "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993). A prosecutor may meet this burden by presenting sufficient evidence for a reasonable trier of fact to conclude, beyond a reasonable doubt, that the defendant's belief of imminent danger was either not honest or was unreasonable. *Id*.

In looking at the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential element of malice for second-degree murder was proven beyond a reasonable doubt. Anita Burton, Michael Burton, Shamicah Burton, and Danielle Hardesty testified that defendant and the victim, Donny Barnett, fought throughout the house on the night in question, in a close series of three separate altercations. Both men suffered injuries as a result of the fighting. After Anita, Michael, Shamicah, and Hardesty broke up the third fight between the victim and defendant, defendant left the living room, went into the kitchen, grabbed a knife, and returned to the living room where the victim was standing. Hardesty testified that defendant hesitated 20 seconds before he stabbed the victim once in the chest. From this evidence, a rational jury could infer defendant acted in obvious disregard of the life-endangering consequences of his actions. Furthermore, while defendant presented proofs suggesting he acted in self-defense, the jury determined that Hardesty's testimony regarding defendant's hesitation and the victim's apparent attempt to exit the house as defendant stabbed him was credible. This Court cannot disturb the credibility determinations of the jury on appeal. See *Mehall*, 454 Mich at 6. The prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant committed second-degree murder and was not acting in self-defense, thus, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next argues that there was insufficient evidence for the jury to convict him of voluntary manslaughter, but there was sufficient evidence to find defendant acted in self-defense. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of voluntary manslaughter are: (1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). "The degree of provocation required to mitigate a killing from murder to manslaughter 'is that which causes the defendant to act out of passion rather than reason.'" *Id*. at 714-715, quoting *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). In order for the provocation to be adequate it must be "that which would cause a *reasonable person* to lose control." *Sullivan*, 231 Mich App at 518 (emphasis in original). "The determination of what is reasonable provocation is a question of fact for the fact-finder." *Id*.

In looking at the evidence in the light most favorable to the prosecution, and in determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, the evidence is sufficient to find defendant committed voluntary manslaughter and did not act in self-defense. Anita, Michael, Shamicah, and Hardesty testified that a close series of three separate altercations occurred between the victim and defendant. The fighting began with verbal assaults between the victim and defendant that continued each time Anita and Hardesty broke the two men apart. Both men were using profanities towards the other, and each altercation appeared to become progressively more intense. The victim was larger in stature and appeared more aggressive than defendant. Furthermore, the fighting between the victim and defendant began over Anita, who was both the victim's ex-wife and defendant's current girlfriend. However, Hardesty testified that after defendant grabbed the knife from the kitchen, he hesitated approximately 20 seconds before stabbing the victim in the chest with the knife while the victim was standing at the threshold of defendant's house, ready to exit the premises. A rational trier of fact would be able to conclude beyond a reasonable doubt that defendant committed voluntary manslaughter, and did not act in self-defense at the time he stabbed the victim. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant argues that his 12 ½ to 25 year sentence for the voluntary manslaughter conviction constitutes cruel and unusual punishment. We disagree. Unpreserved sentencing errors are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id*.

Both the United States and Michigan Constitutions prohibit inflicting cruel and unusual punishment upon a defendant convicted of a charged offense. US Const, Am VIII; Const 1963, art 1, § 16; see, also, *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). However, a sentence within the minimum statutory guidelines range is presumptively proportionate, and a proportionate sentence is not cruel and unusual punishment. *Powell*, 278 Mich App at 323; *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). Defendant does not claim error in the calculation of his sentencing guidelines, admits that his sentence is proportionate, and defendant's minimum sentence is within the guidelines range, thus, his sentence is not cruel and unusual punishment on this basis.

Defendant argues that his sentence is cruel and unusual punishment because there was insufficient evidence supporting the voluntary manslaughter conviction, and sufficient evidence supporting his self-defense claim. Furthermore, because defendant is 35 years old, a minimum sentence of 12 ½ years will result in defendant serving prison time until he is 47 years old and a maximum sentence of 25 years could result in defendant serving prison time until he is 60 years old if he is continuously denied parole. As previously discussed, the evidence was sufficient to uphold defendant's voluntary manslaughter conviction. See *Powell*, 278 Mich App at 323 (if the evidence was not legally sufficient, the remedy would not be to find the defendant's sentence to be cruel and unusual punishment, rather, it would be to vacate [the defendant's] conviction).

Furthermore, there is "no basis … [requiring] that the trial judge tailor every defendant's sentence in relationship to the defendant's age. Persons who are sixty years old are just as capable of committing grievous crimes as persons who are twenty years old. We find no principled reason to *require* that a judge treat similar offenses that are committed by similarly depraved persons differently solely on the basis of the age of the defendant at sentencing where the Legislature has authorized the judge to impose life or *any* term of years." *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997) (emphasis in original). Therefore, a defendant's age is not a factor the trial court must account for when determining a defendant's minimum sentence. Because sufficient evidence existed for defendant's convictions, and defendant's age is not relevant in determining his sentence, defendant's sentence does not constitute cruel and unusual punishment.

Finally, defendant, in his standard 4 brief, argues that a new trial is warranted because the jury received extraneous material. We disagree. Unpreserved issues are reviewed for plain error affecting substantial rights, meaning the error must have affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763-764.

A criminal defendant has the right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). The defendant must show actual prejudice resulted from the presence of the allegedly biased juror to justify a new trial. *Miller*, 482 Mich at 548-549. During jury deliberations, jurors may only consider the evidence that is presented to them in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *Id.*

For a defendant to prove that the extraneous material requires reversal, he must initially prove two points. First, the defendant must show that the jury was exposed to extraneous

material. *Budzyn*, 456 Mich at 88. Second, the defendant "must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Id*. at 89. To prove this second point, "the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id*. If the defendant meets his initial burden, the burden shifts to the prosecution to prove that the error was harmless beyond a reasonable doubt. *Id*.

After reviewing the record, defendant has failed to prove that the jury was exposed to extraneous material. While the record suggests that the prosecution believed there was a possibility that some jury members may have overheard the case being discussed by the victim's family, and thus, requested the jury be questioned, not even the prosecution knew what information may have been heard. Both the prosecution and defense counsel agreed it was proper for the trial court to first ask the jurors as whole a general question regarding whether they overheard information about the case during the lunch hour, and then any juror who raised their hand would be individually questioned. No juror came forward after the trial court asked the jury panel, and then the trial court again gave the jury instruction that no juror was to discuss the case or be present during a discussion of the case until jury deliberations begun. Jurors are presumed to follow their instructions. *Graves*, 458 Mich at 486. Defendant has failed to show that plain error warranting reversal occurred.

We also note that defendant's standard 4 brief did not properly present his claim of ineffective assistance of counsel within the statement of questions presented, and defendant has failed to cite legal authority or provide an analysis of the issue. This issue is therefore abandoned on appeal. See generally *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue."). In any event, defendant has not shown how defense counsel was ineffective because no error occurred. See *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007) (there is no obligation for a defense attorney to make a futile objection).

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens